83-2049

Office Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. _____

MICHAEL KUZMA,

Petitioner,

vs.

UNITED STATES POSTAL SERVICE and
KENNETH H. FLETCHER, Chief
Postal Inspector,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Are pro se litigants entitled to attorney fees under the Freedom of Information Act?

2. Does the United States Court of Appeals for the Second Circuit have the authority to rewrite legislation?

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vs.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Michael Kuzma, respectfully prays that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the Second Circuit entered on January 3, 1984.

Opinion Below

The Court of Appeals entered its memorandum decision

affirming the denial of petitioner's motion for attorney fees on January 3, 1984. A copy of the memorandum is attached as Appendix A.

The Court denied petitioner's petition for rehearing on March 20, 1984. A copy of the order is attached as Appendix B.

Jurisdiction

On January 3, 1984 the Court of Appeals entered judgement affirming the denial of petitioner's motion for attorney fees. (Appendix A) The jurisdiction of this Court is invoked under 5 USC 552 (a) (4) (B).

Questions Presented For Review

1. Are *pro se* litigants entitled to attorney fees under the Freedom of Information Act?

2. Does the United States Court of Appeals for the Second Circuit have the authority to rewrite legislation?

Statute Involved

The law, 5 USC 552 (a) (4) (E), provides as follows:

> The Court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

Statement Of The Case

On January 3, 1984, a panel of the Second Circuit Court of Appeals affirmed the decision of the U.S. District Court for the Western District of New York denying petitioner's motion for attorney fees. A petition for rehearing pursuant to Rule 40(a) of the Federal Rules of Appellate Procedure was filed February 23, 1984, and the petition was denied on March 20, 1984.

Reasons For Granting The Writ

1. *PRO SE* LITIGANTS SHOULD BE AWARDED ATTORNEY FEES IN ORDER TO EFFECTUATE THE POLICY ESTABLISHED BY CONGRESS WHEN IT AMENDED THE FOIA IN 1974.

It has been established that *pro se* litigants are entitled to attorney fees.

The Court held in *Holly v. Acree*, 72 F. R. D. 115 (D.D.C. 1976), aff'd sub nom. *Holly v. Chasen*, 569 F. 2d 160 (D.C. Cir., 1977):

> "Barriers are removed and persons are encouraged to vindicate their FOIA rights more by permitting them to recover fees for the time spent in the role of their own attorneys than confining such awards to members of the bar. Moreover when persons exercise their right to represent themselves before the bar of justice they are in every sense functioning as attorneys; they do research, file pleadings and advocate their cause."

The Holly Court's interpretation of section 552 (a) (4) (E) was affirmed without opinion by the District of Columbia Circuit, 569 F. 2d 160 (1977) and was reaffirmed in *Cox v. United States Dept. of Justice*, 601 F. 2d 1, 5-6 (D.C. Cir. 1979):

> "In authorizing courts to award attorneys' fees in Freedom of Information Act cases, Congress sought to encourage private persons to assist in furthering the national policy that favors disclosure of government documents. Consistent with this intent, this court has held that it is unnecessary for a complainant who is an attorney acting *pro se* to have actually incurred attorney's fees in order to be eligible for an award of same. *Cuneo v. Rumsfeld*, 180 U.S. App. D.C. 184, 188-89, 553 F. 2d 1360, 1364-65 (1977). In *Holly v. Acree*, 72 F. R. D. 115, 116 (D.D.C. 1976), *aff'd by order sub nom. Holly v. Chasen*, 186 U.S. App. D.C. 329, 569 F. 2d 160 (1977), the district court employed similar reasoning in a situation in which a layman was acting *pro se*. Consequently, under these cases, the fact that Cox is not an

> attorney does not disqualify him from receiving an award of attorney's fees. If Cox indeed 'substantially prevailed' in his action, then the district court may in its discretion grant him an award of fees."

This was reiterated in *Crooker v. Department of Treasury*, 663 F. 2d 140 (D.C. Cir. 1980). Also see, *Mahler v. IRS*, No. 79-3238 (D.D.C. March 28, 1980); *Jones v. U.S. Secret Service*, 81 F. R. D. 700 (D.D.C. 1979); *Crooker v. Justice Department*, 1 GDS 79,160 (D.D.C. 1979).

Pro se litigants have also been awarded attorney fees in *Crooker v. U.S. Dept. of Justice*, No. B-79-299 (D. Conn. January 25, 1980); *Marschner v. Department of State, etc.*, 470 F. Supp. 196 (D. Conn. 1979); *Crooker v. U.S. Dept. of Justice*, No. 79-191 (D. Conn. September 26, 1979); *Crooker v. U.S. Dept. of Justice*, No. B-79-59 (D. Conn. July 10, 1979); *Webb v. SEC*, No. 78-1618-F (D. Mass. September 25, 1978).

The District of Columbia plays a unique role in interpretation of the FOIA, since under a venue provision which was added in 1974 any FOIA case may be brought in that circuit, regardless of where the plaintiff resides or where the records sought are located. 5 USC 552 (a) (4) (B). As a result, a large percentage of all FOIA cases are litigated in the District of Columbia, and the judges within the circuit have developed substantial expertise in FOIA law.

Indeed, the District of Columbia's special expertise in FOIA matters began to be developed even before the special venue provision was added in 1974, and the existence of such expertise was one of the reasons for the venue amendment. Thus, the Senate Report 93-854, 93d Cong., 2d Sess. 12-13 (1974) provides the following justification for the amendment:

> "Over one-third of reported FOIA cases have thus far been brought in the District of Columbia, and the courts of that district have gained substantial expertise in this area."

An examination of published decisions and the slip opinions

for the various circuits indicates that the D.C. Circuit decides as many FOIA cases in a typical month as many circuits do in a year. Therefore, since there are differences in the interpretation of section 552 (a) (4) (E) between the D.C. Circuit and the First, Second, Third, Fifth, Sixth, Tenth, and Eleventh Circuits, this Court should accord greater weight to the decisions from the D.C. Circuit. Moreover, as will be discussed in detail below, decisions in which attorney fee awards were denied to *pro se* litigants should be rejected because they are inconsistent with the policies underlying section 552 (a) (4) (E).

As brought out in Senate Report 93-854, 93d Cong. 2d Sess. 18 (1974):

> "Even the simplest FOIA case, according to testimony, involves legal expenses of over $1,000 (Hearings, vol. I at 211; vol. II at 96.)"

Petitioner was unable to afford an attorney nor enlist free legal assistance. Therefore, petitioner was left with no other alternative but to attempt to vindicate his rights under the FOIA by pursuing his lawsuit *pro se* and thereupon embarked on a crash course embracing the drafting of legal papers, court procedure, etc.

As brought out in Senate Report 93-854, 93d Cong. 2d Sess. 18 (1974):

> "Congress has established in the FOIA a national policy of disclosure of government information, and the committee finds it appropriate and desirable, in order to effectuate that policy to provide for the assessment of attorneys fees against the government where the plaintiff prevails in FOIA litigation. Further, as observed by Senator Thurmond: 'We must insure that the average citizen can take advantage of the law to the same extent as giant corporations with large legal staffs. Often the average citizen has foregone the legal remedies supplied by the Act because he has had neither the financial nor legal resources to pursue litigation when his Administrative remedies have been exhausted.' (Hearings, vol. I at 175)."

The attorney fees provision was meant to remove barriers to the average person's ability to secure compliance with the Act and that such a barrier may well be presented by the prospect of having to pay an attorney.

The primary consideration in deciding whether *pro se* litigants should be awarded attorney fees must be effectuation of the policy underlying the FOIA. In enacting the FOIA, Congress created a disclosure statute which depended on suits by private litigants for enforcement.

Without public enforcement, a silent erosion of Congressional policy may ensue.

Awards of attorney fees to *pro se* FOIA litigants will further FOIA goals and the intent of Congress and that is to encourage private litigation as a means of discouraging government non-compliance with the disclosure requirements of the FOIA.

If *pro se* litigants cannot expect compensation for time spent on their cases, even if they prevail, they face an additional barrier to filing suit, which is tantamount to suppression and deprivation of their First Amendment right to seek redress of grievances.

Since the purpose of the FOIA is to encourage disclosure of government information, the denial of petitioner's claim will effectively persuade a governmental agency to violate the law by willful non-disclosure when they learn of an individual's financial inability to retain counsel with "up front" money.

Petitioner will now touch briefly on those cases wherein the courts denied attorney fees to *pro se* litigants as they will undoubtedly be heavily relied on by respondents in their reply brief.

The court in *Burke v. United States Department of Justice*, 559 F. 2d 1182 (10th Cir. 1977), aff'g 432 F. Supp. 251 (D. Kan. 1976) denied attorney fees to a *pro se* plaintiff in an FOIA case; however, there is absolutely no reasoning or citation of authorities provided for the court's decision.

In *Barrett v. Bureau of Customs*, 651 F. 2d 1087 (5th Cir.

1981) the Court denied attorney fees to a lay person acting *pro se*.

However, in *Cazalas v. United States Dept. of Justice*, 709 F. 2d 1051 (5th Cir. 1983) the Court awarded attorney fees to an attorney acting *pro se*!

The Fifth Circuit's position on this issue is incredible, to say the least. Congress could not have possibly intended to discriminate between FOIA litigants solely on the basis of whether they were licensed to practice law. An attorney has no greater right to litigate *pro se* than does a non-attorney. The courts are open to everyone—those who can afford to pay an attorney and those who have to do it themselves. The latter are just as entitled to be paid as the former to be reimbursed.

The Sixth Circuit denies attorney fees to *pro se* litigants—non-attorneys and attorneys alike. See *Wolfel v. United States*, 711 F. 2d 66 (6th Cir. 1983) and *Falcone v. IRS*, 714 F. 2d 646 (6th Cir. 1983).

The First, Third, and Eleventh Circuits have declined to award attorney fees to *pro se* litigants. See *Crooker v. U.S. Department of Justice*, 632 F. 2d 916 (1st Cir. 1980); *Cunningham v. FBI, et al.*, 664 F. 2d 383 (3rd Cir. 1981); and *Clarkson v. Internal Revenue Service*, 678 F. 2d 1368 (11th Cir. 1982).

The remaining circuits have yet to be confronted with the issue.

It's interesting to note that the First, Third, and Eleventh Circuits do not rely on the legislative history of the attorney fees provision of the FOIA to support their ill-conceived contention that *pro se* complainants who substantially prevail are not entitled to attorney fees, because to do so would be detrimental to their argument.

Courts that deny the award of attorney fees to *pro se* litigants fly in the face of the intent of Congress and the law and give their stamp of approval to those government agencies and

officials thereof who violate the disclosure requirement of the FOIA and thwart the necessity of voluntary compliance.

2. THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DOES NOT HAVE THE AUTHORITY *TO REWRITE LEGISLATION.*

The United States Court of Appeals for the Second Circuit is on the record that a *pro se* litigant who substantially prevails might be entitled to attorney fees if he could show that he had foregone an opportunity to earn his "regular income for a day or more in order to prepare and pursue a *pro se* suit." See *Kuzma v. U.S. Postal Service*, 725 F. 2d 16 at 17 (2d Cir. 1984) and *Crooker v. U.S. Dept. of the Treasury*, 634 F. 2d 48 at 49 (2d Cir. 1980). There is absolutely no stipulation in the law that a complainant who has substantially prevailed must make a showing that he diverted time from income-producing activity in order to be awarded attorney fees nor does the legislative history of the attorney fees provision of the FOIA suggest that such a stipulation was contemplated by Congress.

The Second Circuit's decision is in direct variance of this Court's oft-stated principle that a court's duty is to construe rather than rewrite legislation. As brought out by this Court in *United States v. Rutherford*, 442 U.S. 544 at 555 (1979):

> ". . . federal courts do not sit as councils of revision empowered to rewrite legislation in accord with their own conception of prudent public policy."

In *Johansen v. United States*, 343 U.S. 427 (1952), this Court discussed the courts' duties in regard to construing legislation. In that case, this Court stated that, "general language . . . must be read in light of the central purpose of the Act, as derived from the legislative history . . . and the surrounding circumstances of its enactment." (at 431).

As brought out earlier, Congress evinced its strong desire, by enacting the FOIA, to establish a national policy of open

government through the disclosure of government information. A crucial means of implementing this policy is a liberal attorney fee provision.

The Second Circuit in *Kuzma* and *Crooker, supra*, has gone far beyond the judicial function and has entered the realm of judicial legislation.

Furthermore, petitioner submits that the Second Circuit's decision in *Crooker, supra* was by design. The appellant in that case, Michael Alan Crooker, was a federal prisoner at the Federal Correctional Institution at Danbury, Connecticut. Mr. Crooker has set all national records for numbers of suits, hours worked for and against, and fee awards denied and granted. See FEDERAL INFORMATION DISCLOSURE, James T. O'Reilly, Shepard's/McGraw Hill, Volume I, Chapter 8, page 8-101. Officials at the Federal Correctional Institution in Danbury, Connecticut, U.S. District Court, and U.S. Attorney's Office were alarmed that Mr. Crooker acting *pro se* was being awarded attorney fees. It's petitioner's contention that the decision in *Crooker, supra* was handed down to inhibit Mr. Crooker from exercising his rights under the FOIA, not to mention his First Amendment right to seek redress of grievances. Prior to the decision in *Crooker, supra* the Second Circuit held that a complainant's status as a *pro se* litigant and a federal prisoner was irrelevant in determining whether an award of attorney fees was appropriate. In *Crooker v. Customs Service*, 634 F. 2d 618 (2d Cir. 1980) and *Crooker v. Office of Pardon Attorney*, No. 80-2163 (2d Cir. August 20, 1980) the Second Circuit reversed the district court's holding that Mr. Crooker's claim for costs and attorney fees was moot. The cause was remanded so that the district court could determine if Mr. Crooker met the criteria for a fee award as set forth in *Kaye v. Burns*, 411 F. Supp. 897, 903 (S.D.N.Y. 1976).

Conclusion

For all the foregoing reasons, petitioner, Michael Kuzma, *Pro Se*, respectfully requests that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the Second Circuit.

Dated: June 1, 1984

Respectfully submitted,

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APPENDIX A.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 435—August Term, 1983

Argued: December 9, 1983 Decided: January 3, 1984

Docket No. 83-6221

MICHAEL KUZMA,

Plaintiff-Appellant,

—v.—

UNITED STATES POSTAL SERVICE, ET AL.,

Defendants-Appellees.

Before:

TIMBERS, VAN GRAAFEILAND, and NEWMAN,
Circuit Judges.

Appeal from an order of the District Court for the Western District of New York (John T. Elfvin, Judge) denying a motion for an attorney's fee and costs by a *pro*

se litigant who prevailed in a suit under the Freedom of Information Act, 5 U.S.C. § 552 (1982).

Affirmed in part, reversed in part, and remanded.

MICHAEL KUZMA, Buffalo, N.Y., *for plaintiff-appellant pro se.*

JACK S. PENCA, Asst. U.S. Atty., Buffalo, N.Y. (Salvatore R. Martoche, U.S. Atty., Buffalo, N.Y., on the brief), *for defendants-appellees.*

PER CURIAM:

Michael Kuzma appeals from the June 29, 1983, order of the District Court for the Western District of New York (John T. Elfvin, Judge) denying his motion for an award of attorney's fees and costs in a suit brought pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (1982). Kuzma, proceeding *pro se*, had obtained a judgment ordering the United States Postal Service and the Chief Postal Inspector to disclose four pages of material concerning an investigation of himself and his business. Judge Elfvin rejected the Service's claim of an investigatory records' exemption based on 5 U.S.C. § 552(b)(7)(A) and (D).

In *Crooker v. United States Department of the Treasury*, 634 F.2d 48 (2d Cir. 1980), we ruled that the attorney's fee provision of FOIA, 5 U.S.C.

§ 552(a)(4)(E), did not authorize recovery of an attorney's fee by a *pro se* federal prisoner who had prevailed in his FOIA lawsuit. We held out the possibility that a *pro se* litigant might be entitled to some fee award if he could show that he had forgone an opportunity to earn "regular income for a day or more in order to prepare and pursue a *pro se* suit." *Id.* at 49. Kuzma makes no claim that his *pro se* activity in this lawsuit caused him the loss of any such opportunity. Instead, he contends that *Crooker*'s denial of a *pro se* attorney's fee should be limited to prisoners. We see no basis for any distinction between prisoners and all other *pro se* litigants with respect to FOIA attorney's fees. All but one of the circuits considering the issue have denied such fees to all *pro se* litigants. *Clarkson v. Internal Revenue Service*, 678 F.2d 1368 (11th Cir. 1982); *Cunningham v. Federal Bureau of Investigation*, 664 F.2d 383 (3d Cir. 1981); *Crooker v. United States Department of Justice*, 632 F.2d 916 (1st Cir. 1980); *Burke v. United States Department of Justice*, 559 F.2d 1182 (10th Cir. 1977); *see Barrett v. Bureau of Customs*, 651 F.2d 1087 (5th Cir. 1981) (construing similar fee provision of the Privacy Act, 5 U.S.C. § 552a(g)(3)(B) (1982)), *cert. denied*, 455 U.S. 950 (1982); *contra*, *Cuneo v. Rumsfeld*, 553 F.2d 1360 (D.C. Cir. 1977) (allowing fee to lawyer acting *pro se* and approving *Holly v. Acree*, 72 F.R.D. 115 (D.D.C. 1976) (non-lawyer *pro se*), *aff'd sub nom. Holly v. Chasen*, 569 F.2d 160 (D.C. Cir. 1977) (table)).

Kuzma's claim for an attorney's fee of $1,000 was properly denied. The Government informed us at oral argument that it has no objection to Kuzma's claim for costs and disbursements totaling $110.04. Accordingly, the order is affirmed in part and reversed in part, and the

cause remanded for entry of an order allowing Kuzma $110.04. Since Kuzma has not prevailed on his claim for an attorney's fee and has secured only 10% of the total amount he sought in the District Court, we decline to allow him the costs of this appeal. *See* Fed. R. App. P. 39(a) & (b).

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APPENDIX B.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 20th day of March, one thousand nine hundred and eighty-four.

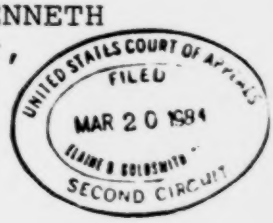
MICHAEL KUZMA,

Plaintiff-Appellant,

v. No. 83-6221

UNITED STATES POSTAL SERVICE and KENNETH H. FLETCHER, Chief Postal Inspector,

Defendants-Appellees.



A petition for a rehearing having been filed herein by plaintiff-appellant, Michael Kuzma, pro-se,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/S/ by Elaine B. Goldsmith,
Clerk